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Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

No. 95-1906

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

VERNON WATTS

UNITED STATES OF AMERICA, PETITIONER

v.

CHERYL PUTRA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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10 pp

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Respondents Watts and Putra acknowledge (Watts Br. in Opp. 7; Putra Br. in Opp. 7) that the courts of appeals are in conflict on the question whether a court may consider "acquitted conduct" in sentencing for the offense of conviction, but they offer three reasons why this Court should deny review of that concededly "important sentencing issue" (Putra Br. in Opp. 7). Those reasons lack merit.

1. Watts contends (Br. in Opp. 14-15) that his case is an inappropriate vehicle for resolution of the ques-

tion presented because the jury instruction given at his trial defining the meaning of "use" under 18 U.S.C. 924(c) was subsequently disapproved in *Bailey* v. *United States*, 116 S. Ct. 501 (1995). Watts therefore argues that resolution of this case will not guide courts in deciding whether a Section 924(c) acquittal precludes application of a sentencing enhancement under Guidelines § 2D1.1(b)(1). That argument is unsound.

The question whether a sentencing court may take into account conduct underlying an offense of which the defendant was acquitted is legal in character. As the case law demonstrates (see cases cited at Pet. 8-9 n.2; see also Putra Br. in Opp. 7), that legal issue arises in a variety of sentencing contexts, and its resolution is important to ensure uniformity in federal sentencing. Because the legal issue is squarely presented in Watts' case, it does not matter that the precise sentencing context of that case is unlikely to recur.

2. Putra argues (Putra Br. in Opp. 5-7) that the petition should be denied because her case is moot. That contention is unfounded. Although Putra has fully served the 27-month term of imprisonment originally imposed by the district court, she concedes (*id.* at 6) that, "upon remand, [she] fully intends to request" that the district court reduce her three-year term of supervised release to account for the fact that, according to the court of appeals' decision, Putra served a prison term that exceeded the upper limit of the applicable Guidelines range.

Under prevailing Ninth Circuit law, Putra appears to be eligible for a reduction in the length of her supervised release term. See *United States* v. *Blake*, 88 F.3d 824, 825 (1996) (holding that "when a criminal

defendant's sentence of imprisonment is reduced below the time he has already served, * * * [the] supervised release portion of the sentence begins on the date [the] [defendant's] term of imprisonment expires, whether or not he is released on that date"); see also *United States* v. *Smith*, 991 F.2d 1468, 1470 (9th Cir. 1993); *United States* v. *Montenegro-Rojo*, 908 F.2d 425, 431 n.8 (9th Cir. 1990).[1] Because supervised release is a component of Putra's sentence for her narcotics conviction (see 18 U.S.C. 3583(a)) that may still be affected by further review, the case is not moot. See *Mabry* v. *Johnson*, 467 U.S. 504, 507 n.3 (1984) (holding case not moot once respondent paroled, because review could affect date on which parole term would expire).

3. Both Watts and Putra contend that the conflict in this case does not warrant the Court's review because "[t]he Sentencing Commission is currently addressing the question of whether acquitted conduct may be considered 'relevant conduct' under Guideline § 1B1.3" (Watts Br. in Opp. 7; see also Putra Br. in Opp. 8).

a. The Commission has announced that one of its priorities for the 1996-1997 Guidelines amendment cycle is "developing options to limit the use of acquitted conduct at sentencing." 61 Fed. Reg. 34,465 (1996). The Commission is considering three proposals for amending the relevant conduct provision, Guidelines

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[1] The United States believes that *Blake* was wrongly decided, and its suggestion for rehearing en banc is currently pending before the Ninth Circuit. Unless the government's suggestion is granted and the decision reversed, however, Putra has a plausible claim that she is entitled to a reduction in her supervised release term as a result of the time served in prison in excess of the applicable Guidelines range.

§ 1B1.3. Option 1 provides that acquitted conduct (defined as conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge) shall not be considered relevant conduct. Option 1 includes two sub-options: Option 1(A) would permit acquitted conduct to be considered in setting the guideline range if the conduct were independently established by evidence not admitted at trial; and Option 1(B) would allow acquitted conduct to be used as a basis for an upward departure. Option 2 provides that acquitted conduct could be considered relevant conduct if established by clear and convincing evidence. Option 3 provides that acquitted conduct may be considered in setting the guideline range on the same basis as other relevant conduct, but that the sentencing court may consider a downward departure if concerns of "fundamental fairness" are presented.[2]

b. Even if the Commission were to adopt one of the foregoing proposals, such action would not resolve the existing split of authority in the courts of appeals. That is because the Ninth Circuit—the sole court of appeals to conclude that acquitted conduct may not be relied upon at sentencing—has not rested its prohibition on an interpretation of the relevant conduct Guideline. Rather, as that court has explained, its prohibition on the use of acquitted conduct "is a judicial limitation on the facts the district court may consider at sentencing, beyond any limitation imposed by the Guidelines." Pet. App. 24a. The Ninth Circuit's rule stems from its view that it "would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted" (*United States* v. *Brady*, 928 F.2d 844, 851 (1991)), and that "[t]o allow the court to increase [a defendant's] sentence based on acquitted conduct would make the jury's findings of fact pointless" (Pet. App. 25a).

[2] The Sentencing Commission has voted to publish these options in the *Federal Register* for comment. We have provided the Court and served respondents with copies of the July 18, 1996, minutes of the Sentencing Commission's meeting and the approved options.

Because the Ninth Circuit's rule is based on reasoning other than Guidelines interpretation, this case is not within the scope of *Braxton* v. *United States*, 500 U.S. 344 (1991). In *Braxton*, the Court noted that Sentencing Commission is charged with the duty "periodically [to] review and revise the Guidelines," *id.* at 348 (quoting 28 U.S.C. 994(*o*)), and it declined to address a question of Guidelines interpretation that had generated a circuit conflict in part "because the Commission ha[d] already undertaken a proceeding that w[ould] eliminate circuit conflict over the meaning of § 1B1.2." *Braxton*, 500 U.S. at 348-349. In this case, by contrast, the conflict does not rest on judicial disagreement over the meaning of Guidelines § 1B1.3, and Commission action (if any) cannot be expected to address the basis for the sentencing disparities created by the Ninth Circuit's sole adherence to a rule barring any consideration of acquitted conduct at sentencing.

In addition, none of the Commission's options would totally bar consideration of acquitted conduct, as the Ninth Circuit has done. It would to some extent ameliorate the circuit conflict if the Commission adopted Option 1 of the proposed amendments to Guidelines § 1B1.3. That option would amend the Guidelines in a fashion that is consistent with the Ninth Circuit's rule that acquitted conduct may not be considered in

establishing a guideline range or as a basis for departure.[3] But even that course of action would not eliminate the conflict, because Option 1 still would permit a sentencing court to consider acquitted conduct in selecting a particular sentence from within the otherwise-applicable guideline range. By contrast, Ninth Circuit law would apparently prohibit even that limited consideration of acquitted conduct: the Ninth Circuit has taken the view (see Pet. App. 23a) that any reliance on acquitted conduct amounts to unfair "punishment" for a crime of which the defendant has been found not guilty.[4]

4. We note that the Ninth Circuit has recently held that one basis of its original precedent barring the consideration of acquitted conduct at sentencing has been overruled by a later decision of this Court. *United States* v. *Sherpa*, Nos. 95-50007 & 95-50054, 1996 WL 571175 (9th Cir. Oct. 8, 1996). The *Sherpa*

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[3] Enactment of Options 1(A), 1(B), and 2 would not resolve the circuit conflict because each of those alternatives runs afoul of the Ninth Circuit's bar on the use of acquitted conduct. That is, a defendant still would be "effectively punish[ed] * * * for an offense for which she has been acquitted" (Pet. App. 23a), regardless of the source of the evidence considered by the trial court (Option 1(A)); upward departures based on acquitted conduct are prohibited by *Brady* itself (Option 1(B)); and the Ninth Circuit's acquitted conduct bar "has nothing to do with the standard of proof" (*Brady*, 928 F.2d at 851 n.12) (Option 2).

[4] In an unreported decision, a panel of the Ninth Circuit concluded that the district court's use of acquitted conduct to choose a sentence at the higher end of the applicable range was contrary to law and therefore appealable under 18 U.S.C. 3742(a). *United States* v. *Walsh*, 985 F.2d 577 (9th Cir. 1991) (Table). The government unsuccessfully sought en banc reconsideration of the panel's decision in *Walsh*.

decision, however, was not an acquitted-conduct case and it does not undercut the need for this Court's review of the Ninth Circuit's rule that acquitted conduct may not form the basis of an enhancement of a defendant's sentence.

In *Sherpa*, the district court departed downwards from a mandatory minimum sentence by invoking the statutory and Guidelines "safety valve" provisions. Those provisions require, *inter alia*, that the defendant has "truthfully provided to the government all information and evidence the defendant has concerning the offense * * *." 18 U.S.C. 3553(f)(5); Guidelines § 5C1.2(5). The defendant in *Sherpa* claimed that he did not know that he was carrying drugs; the jury's verdict of guilty, however, necessarily reflected a finding that the defendant did know he was carrying drugs. The panel held that a district court could find the safety valve applicable, because the court was permitted to reconsider and reject facts necessary to a jury verdict. *Sherpa*, 1996 WL 571175, at *6. In so ruling, the panel held that the conclusion in *United States* v. *Brady*, *supra*, that a district court may not reconsider facts necessarily rejected by a jury verdict had been overruled by *Koon* v. *United States*, 116 S. Ct. 2035 (1996). *Sherpa*, 1996 WL 57115, at *5. ("We now hold that the approach we took in *Brady* is overruled by the Supreme Court's decision in *Koon*.").

Sherpa does not validate the use of acquitted conduct at sentencing. That case neither involved acquitted conduct, nor addressed what the Ninth Circuit has termed the "core rationale" of *Brady*, *i.e.*, that it would "pervert our system of justice [to] allow[] a defendant to suffer punishment for a criminal charge for which he or she was acquitted."

United States v. *Pinkney*, 15 F.3d 825, 829 (9th Cir. 1994); see also *United States* v. *Duran*, 15 F.3d 131, 133 (9th Cir. 1994) ("*Brady* based its conclusion on the unfairness of punishing the defendant for an offense for which he or she had been acquitted"); Pet. App. 13a (same). If anything, *Sherpa* highlights the error in the Ninth Circuit's acquitted conduct rule, because it leaves as the only basis for that rule the Ninth Circuit's thesis that a defendant is "punished" for acquitted conduct when a judge considers that conduct in sentencing for another offense. That principle is squarely in conflict with this Court's decision in *Witte* v. *United States*, 115 S. Ct. 2199 (1995). Pet. 15-16. Because the Ninth Circuit's view is irreconcilable with *Witte*, and the acquitted conduct rule results in significantly different sentences in the Ninth Circuit than elsewhere, this Court's intervention is warranted.

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For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Acting Solicitor General

OCTOBER 1996